

Jan 12, 2023

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PATRICIA B.,

Plaintiff,

v.

KILOLO KIJAKAZI,
ACTING COMMISSIONER OF
SOCIAL SECURITY,

Defendant.

No. 2:21-CV-00118-ACE

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

ECF Nos. 16, 20

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 16, 20. Attorney Dustin D. Deissner represents Patricia B. (Plaintiff); Special Assistant United States Attorney Michael J. Mullen represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 12. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

JURISDICTION

On May 10, 2019, Plaintiff filed an application for Disability Insurance Benefits alleging disability since June 25, 2017, due to lower right back pain, nerve pain, and chronic pain. Tr. 144, 178. The application was denied initially and upon reconsideration. Administrative Law Judge (ALJ) Mark Kim held a hearing

1 on August 28, 2020, Tr. 30-52, and issued an unfavorable decision on October 19,
2 2020, Tr. 15-25. The Appeals Council denied Plaintiff's request for review on
3 January 19, 2021. Tr. 1-6. The ALJ's October 2020 decision thus became the
4 final decision of the Commissioner, which is appealable to the district court
5 pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on
6 March 19, 2021. ECF No. 1.

7 **STATEMENT OF FACTS**

8 Plaintiff was 43 years old on the disability onset date, June 25, 2017. Tr.
9 144. Plaintiff's disability report indicates she completed 2 years of college by
10 2012, Tr. 179, worked as a nursing assistant from 2013 to 2017, Tr. 179, and
11 stopped working on June 25, 2017, because of her condition, Tr. 178.

12 Plaintiff testified at the administrative hearing on August 28, 2020, that she
13 was not able to work because of a weight (lifting) restriction of 25 pounds and an
14 inability to stand longer than 30 minutes at a time. Tr. 35. She stated she had
15 constant, excruciating pain (sciatic nerve pain down her right leg and in the middle
16 of her back), Tr. 35, 42-43, and indicated that the pain interfered with her ability to
17 concentrate, Tr. 36-37, 43. Plaintiff testified she could stand in one place for 30
18 minutes, Tr. 39, sit for about 20 to 30 minutes at one time, Tr. 39, lift up to 25
19 pounds, Tr. 40, and walk about half-a-block, Tr. 44.

20 **STANDARD OF REVIEW**

21 The ALJ is tasked with "determining credibility, resolving conflicts in
22 medical testimony, and resolving ambiguities." *Andrews v. Shalala*, 53 F.3d 1035,
23 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with
24 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
25 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
26 only if it is not supported by substantial evidence or if it is based on legal error.
27 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
28 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at

1 1098. Put another way, substantial evidence “is such relevant evidence as a
 2 reasonable mind might accept as adequate to support a conclusion.” *Richardson v.*
 3 *Perales*, 402 U.S. 389, 401 (1971), *quoting Consolidated Edison Co. v. NLRB*, 305
 4 U.S. 197, 229 (1938). If the evidence is susceptible to more than one rational
 5 interpretation, the Court may not substitute its judgment for that of the ALJ.
 6 *Tackett*, 180 F.3d at 1098; *Morgan v. Commissioner of Social Sec. Admin.*, 169
 7 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the administrative
 8 findings, or if conflicting evidence supports a finding of either disability or non-
 9 disability, the ALJ’s determination is conclusive. *Sprague v. Bowen*, 812 F.2d
 10 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision supported by
 11 substantial evidence will be set aside if the proper legal standards were not applied
 12 in weighing the evidence and making the decision. *Browner v. Secretary of Health*
 13 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

14 **SEQUENTIAL EVALUATION PROCESS**

15 The Commissioner has established a five-step sequential evaluation process
 16 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *Bowen v.*
 17 *Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the claimant
 18 bears the burden of establishing a prima facie case of disability benefits. *Tackett*,
 19 180 F.3d at 1098-1099. This burden is met once a claimant establishes that a
 20 physical or mental impairment prevents the claimant from engaging in past
 21 relevant work. 20 C.F.R. § 416.920(a)(4). If a claimant cannot perform past
 22 relevant work, the ALJ proceeds to step five, and the burden shifts to the
 23 Commissioner to show (1) that Plaintiff can perform other substantial gainful
 24 activity and (2) that a significant number of jobs exist in the national economy
 25 which Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1497-1498 (9th Cir.
 26 1984). If a claimant cannot make an adjustment to other work in the national
 27 economy, the claimant will be found disabled. 20 C.F.R. § 416.920(a)(4)(v).

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ADMINISTRATIVE DECISION

On October 19, 2020, the ALJ issued a decision finding Plaintiff was not disabled as defined in the Social Security Act.

At step one, the ALJ found Plaintiff had not engaged in substantial gainful activity since June 25, 2017, the alleged onset date. Tr. 18.

At step two, the ALJ determined Plaintiff had the following severe impairments: lumbar degenerative disc disease with radiculopathy and sacrococcygeal disorder. Tr. 18.

At step three, the ALJ found Plaintiff did not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments. Tr. 18.

The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found Plaintiff could perform light exertion level work with the following limitations: stand or sit one hour at a time and walk only fifteen minutes at a time; never crawl or climb ladders or scaffolds; occasionally stoop, kneel, and crouch; less than occasionally climb flights of stairs; and avoid excessive vibrations and unprotected heights. Tr. 18.

At step four, the ALJ found Plaintiff was not able to perform any past relevant work. Tr. 23.

At step five, the ALJ determined that, based on the testimony of the vocational expert, and considering Plaintiff's age, education, work experience, and RFC, Plaintiff was capable of making a successful adjustment to other work that exists in significant numbers in the national economy, including the jobs of office helper, small product assembler II, and electronics worker. Tr. 24-25.

The ALJ thus concluded Plaintiff was not under a disability within the meaning of the Social Security Act from June 25, 2017, the alleged disability onset date, through October 19, 2020, the date of the ALJ's decision. Tr. 25.

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ISSUES

The question presented is whether substantial evidence supports the ALJ's decision denying benefits and, if so, whether that decision is based on proper legal standards.

Plaintiff contends the Commissioner erred in his evaluation of Plaintiff's subjective symptom complaints. ECF No. 16 at 6-9.

DISCUSSION

Plaintiff challenges the ALJ's rejection of her subjective complaints of severe pain with activity. ECF No. 16 at 6-9. Defendant responds that the ALJ reasonably discounted Plaintiff's subjective allegations. ECF No. 20 at 4-9.

It is the province of the ALJ to make credibility determinations. *Andrews*, 53 F.3d at 1039. However, the ALJ's findings must be supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's testimony must be "clear and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). "General findings are insufficient: rather the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

In this case, the ALJ found Plaintiff's medically determinable impairments could reasonably be expected to cause the alleged symptoms; however, Plaintiff's statements concerning the intensity, persistence, and limiting effects of those symptoms were not entirely consistent with the medical and other evidence of record. Tr. 19-20.

The ALJ first determined that the objective medical evidence did not support the frequency and severity of Plaintiff's alleged symptoms and limitations. Tr. 20-22. A lack of supporting objective medical evidence is a factor which may be considered in evaluating an individual's credibility, provided it is not the sole

factor. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991); *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 883 (9th Cir. 2006). Moreover, “[c]ontradiction with the medical record is a sufficient basis for rejecting the claimant’s subjective testimony.” *Carmickle v. Comm’r Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008). In assessing a Plaintiff’s subjective pain and symptom testimony, an ALJ may consider whether the alleged symptoms are consistent with the medical evidence. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1040 (9th Cir. 2007).

As noted by the ALJ, imaging evidence of record reflects no acute abnormalities: an August 2017 MRI of the lumbar spine revealed a new small posterior disc protrusion at L2-3 without evidence of nerve root contact and no significant spinal canal or neural foraminal stenosis, Tr. 552; a January 2018 EMG was normal, Tr. 362; a June 2018 MRI of the lumbar spine revealed a small bulging disc at L2-3 without nerve compression, Tr. 371; and an April 2019 MRI revealed only mild multilevel disc and facet degeneration, grossly unchanged compared to the August 2017 imaging, Tr. 496-497. Tr. 20.

Treatment and examination records additionally contradict the degree of limitation alleged by Plaintiff: a June 2017 exam revealed Plaintiff had full muscle strength, was neurovascularly intact, and walked without difficulty, Tr. 436; a July 2017 exam indicated Plaintiff was relatively stable and recommended physical therapy, Tr. 431-432; and Plaintiff demonstrated a normal gait during subsequent examinations, Tr. 324, 330, 332, 334, 342, 360, 370, 375, 399, 403, 406. Tr. 20-21. Plaintiff’s treatment plan consisted of physical therapy with pain medications and steroid injections,¹ and, as noted by Defendant, ECF No. 20 at 5, physical therapy notes show that Plaintiff was able to walk up to half a mile, Tr. 1043, 1054, 1057, 1059, 1061, 1064, 1070, 1073, 1080.

¹No provider recommended surgery such as a discectomy or spinal fusion. Tr. 20-22 (*see* Tr. 608).

1 On October 19, 2019, state agency medical consultant Merry Alto, M.D.,
2 reviewed the record and opined that Plaintiff could perform light exertion level
3 work with frequent climbing ramps/stairs, stooping and balancing; occasional
4 climbing of ladders/ropes/scaffolds; occasional kneeling, crouching, or crawling;
5 and some environmental limitations. Tr. 69-71. Dr. Alto noted Plaintiff was
6 independent in activities of daily living and had reported progressing in normal
7 activities with significant improvement in function and symptom reduction. Tr. 67
8 referencing Tr. 652.

9 A June 24, 2020 exam for pain management noted the April 2019 MRI was
10 overall “quite good” with mild and minimal results, Tr. 682,² and recommended
11 Plaintiff engage in an exercise program that focused on weight loss, conditioning,
12 stretching, and trunk strengthening to alleviate her low back pain, Tr. 683. Tr. 21-
13 22.

14 An August 27, 2020 examination by Scott Kitchel, M.D., revealed some
15 limitation of spinal range of motion and straight leg raising test on the right
16 produced pain; however, Plaintiff had full muscle strength, no atrophy, and no
17 difficulty arising from a chair, standing erect, heel-and-toe walking or single leg
18 toe raising. Tr. 1097-1098. Dr. Kitchel opined that Plaintiff could return to full,
19 unrestricted work. Tr. 1099.

20 Based on the foregoing, the Court finds substantial evidence supports the
21 ALJ’s finding that Plaintiff’s subjective complaints were inconsistent with, and not
22 supported by, the objective medical evidence of record.

23 The ALJ also determined that the conservative treatment recommended by
24 Plaintiff’s treatment providers was inconsistent with her allegations. Tr. 22.
25 Evidence of “conservative treatment” is sufficient to discount a claimant’s
26

27 ²It was noted that Plaintiff’s “MRI and lumbar plain films show very little
28 pathology.” Tr. 683.

1 testimony regarding severity of an impairment. *Parra v. Astrue*, 481 F.3d 742, 751
2 (9th Cir. 2007); *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995)
3 (conservative treatment suggests a lower level of both pain and functional
4 limitation). As indicated above, Plaintiff's treatment consisted of physical therapy
5 with pain medications and steroid injections; no provider recommended surgery.
6 See Tr. 608. Plaintiff's conservative treatment during the relevant time period was
7 a legitimate reason for the ALJ to discount her claim of disabling pain and
8 limitations.

9 The ALJ also indicated the record reflects Plaintiff had improvement with
10 treatment. Tr. 20-22. An ALJ may rely on the effectiveness of treatment to find a
11 plaintiff's testimony unpersuasive. See e.g. *Morgan v. Comm'r of Social Sec.*
12 *Admin.*, 169 F.3d 595, 600 (9th Cir. 1999) (an ALJ may properly rely on a report
13 that a plaintiff's mental symptoms improved with the use of medication); *Odle v.*
14 *Heckler*, 707 F.2d 439, 440 (9th Cir. 1983) (noting impairments that are controlled
15 by treatment cannot be considered disabling). Plaintiff had short-term relief
16 following epidural injections in August 2018, Tr. 20, 21, 353, 410; her physical
17 therapist reported in October 2019 that Plaintiff "is really beginning to show some
18 significant improvement in function and symptoms reduction," Tr. 21, 652;
19 improvement was again noted by her physical therapist in November 2019, Tr.
20 997; and Plaintiff informed her physical therapist in March 2020 that her
21 tolerances for activities of daily living had improved since beginning therapy, Tr.
22 21, 1075. The Court finds Plaintiff's improved condition following treatment was
23 an additional valid reason, supported by substantial evidence, for discounting
24 Plaintiff's subjective complaints in this case.

25 Finally, the ALJ found Plaintiff's reported activities showed greater
26 functional ability than she alleged. Tr. 22. It is well-established that the nature of
27 daily activities may be considered when evaluating credibility. *Fair v. Bowen*, 885
28 F.2d 597, 603 (9th Cir. 1989). For daily activities to discount subjective symptom

1 testimony, the activities do not need to be equivalent to full-time work; it is
2 sufficient that a claimant's activities "contradict claims of a totally debilitating
3 impairment." *See Molina v. Astrue*, 674 F.3d 1104, 1112-1113 (9th Cir. 2012). A
4 claimant, however, need not be utterly incapacitated to receive disability benefits,
5 and completion of certain routine activities is insufficient to discount subjective
6 symptom testimony. *Id.* at 1112-1113 (noting that a "claimant need not vegetate
7 in a dark room in order to be eligible for benefits" (quotation marks omitted));
8 *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001) ("This court has
9 repeatedly asserted that the mere fact that a plaintiff has carried on certain daily
10 activities, such as grocery shopping, driving a car, or limited walking for exercise,
11 does not in any way detract from her credibility as to her overall disability.").

12 Here, the ALJ specifically identified Plaintiff's ability to provide custodial
13 supervision of her stepdad, take care of the family's pets, cook, and, with the help
14 of her husband, clean the house and do the laundry. Tr. 22, 243-244. Plaintiff also
15 reported she regularly went to the store (1-2 times a week), rides with others or
16 drives to shop for groceries, and spends time with her mother-in-law watching
17 movies or having lunch once a week. Tr. 22, 245-246. The Court finds that it was
18 reasonable for the ALJ to conclude that Plaintiff's documented activities of daily
19 living were inconsistent with her allegations of disabling pain and thus detracted
20 from her overall credibility.

21 The Court notes Plaintiff has not specifically contested the aforementioned
22 credibility findings by the ALJ. The Court ordinarily will not consider matters on
23 appeal that are not specifically challenged in an opening brief, *Carmickle*, 533 F.3d
24 at 1161 n.2, and will not "manufacture arguments for an appellant," *Greenwood v.*
25 *Fed. Aviation Admin.*, 28 F.3d 971, 977 (9th Cir. 1994). Nevertheless, as discussed
26 above, the Court finds the ALJ provided clear and convincing reasons, which are
27 fully supported by the record, for finding Plaintiff's symptom allegations were not
28 entirely credible in this case.

1 **CONCLUSION**

2 Having reviewed the record and the ALJ's findings, the Court finds the
3 ALJ's decision is supported by substantial evidence and free of error.

4 Accordingly, **IT IS HEREBY ORDERED:**

5 1. Defendant's Motion for Summary Judgment, **ECF No. 20**, is
6 **GRANTED.**

7 2. Plaintiff's Motion for Summary Judgment, **ECF No. 16**, is **DENIED.**
8 **IT IS SO ORDERED.** The District Court Executive is directed to file this
9 Order and provide a copy to counsel for Plaintiff and Defendant. **Judgment shall**
10 **be entered for DEFENDANT and the file shall be CLOSED.**

11 DATED January 12, 2023.



A handwritten signature in blue ink, reading "Alexander C. Ekstrom", is written over a horizontal line.

ALEXANDER C. EKSTROM

UNITED STATES MAGISTRATE JUDGE